83-1335

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ALEXANDER L. STEVAS,
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NO._____

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NANCY A. KONIG, Appellant,

v.

SHARON C. ABBOTT, Appellee.

On Appeal From The Municipal Court of The City Of Long Beach, County Of Los Angeles, State Of California

JURISDICTIONAL STATEMENT

Nancy Ann Konig
Appellant. In Pro Se
202 West 37th Street
Long Beach, CA. 90807
213- #624-7753

January, 1984

QUESTIONS PRESENTED

I. Whether there was an abuse of discretion by Appellate Department and misconduct by opposing counsel, as described in the "statement", which did not amount to mere error, that resulted in a violation of Appellant's "due process."

2. Whether there was constructive eviction by Appellant or breach of contract and abandonment by Appellee, on April I5, I98I?

3. If there was abandonment by Appellee, would there be a termination of the lease under California Civil Code I95I.2?

4. Whether a notice of "A Belief of Abandonment" is required under California Civil Code I95I.3(f)?

5. Whether Appellant was entitled to rent while Appellee remained in possession and had not followed through with her notice to vacate, surrender possession and terminate the lease and would small claims action for rent

filed while Appellee was still in possession and delinquent in rent affect her subsequent surrender and termination of the lease?

6. If abandonment is final, can it be reversed at a later date?

7. Whether Appellee's claim she was evicted on April 26, I98I valid, when she had surrendered said unit on April I5, I98I and Appellant took possession?

8. Is abandonment complete and final? If Appellee changed her mind on May 4, I98I and wanted to rent the apartment, would she become a <u>new</u> tenant, in a <u>new</u> tenancy?

9. Whether under California Civil Code 789.3(b), the property has to be used by the tenant as a residence at the time she alleges landlord changed locks to terminate her tenancy?

I0. Whether Appellant had the right in an emergency to protect the unit by changing the lock combinations for two days, while the unit was still vacant and Appellee had never

entered into possession after her second tenancy began?

II. Whether there must be proof of an intent by Appellant to terminate Appellee's occupancy, if she was an occupant after the second tenancy began?

I2. Whether Appellee should have made a demand for surrender of the premises, if she thought there was a forcible detainer by Appellant, in her alleged absence? Whether Appellant should have informed Appellant she could not unlock said doors to ascertain if there was an intent to terminate her tenancy or if there was a reasonable explanation, since it was the weekend, and Appellee testified she had never given her new address to Appellant?

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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, I983

NO._____

NANCY A. KONIG, Appellant,

v.

SHARON C. ABBOTT, Appellee.

On Appeal From The Municipal Court Of The City Of Long Beach, County Of Los Angeles, State Of California.

JURISDICTIONAL STATEMENT

Appellant appeals the judgment below of the Municipal Court, ordered on September 2, I98I, in a tenant/landlord civil action under California Civil Code 789.3. Appellee/tenant claimed Appellant/landlord changed the locks on her apartment with the intent to terminate her occupancy.

OPINIONS BELOW

I. The Municipal Court made no official findings of fact or conclusions of law. A copy of part of the judgment order, calculated under California Civil Code 789.3, appears as (App. A, infra, 35a).

2. A copy of the "Opinion and Judgment" order of the Appellate Department of the Superior Court, County of Los Angeles, State of California appears as (App. B,infra 36a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., section I257. Western Union Tele. V. Penn., 368 U.S. 7I (I96I); Zucchini v. Scripts-Howard Broadcasting Co., 433 U.S. 562 (I977).

I. The Municipal Court ordered judgment, in this civil case, under California C.C. 789.3 against Appellant on September 2, I98I.

2. Appellant filed a direct appeal to the Appellate Department of the Superior Court,

County of Los Angeles, State of California, and judgment was affirmed on June I6, I983. (See App. B, infra, 36a).

Appellate Department denied Appellant a rehearing and certification to Court of Appeals.

3. Appellant's petition for a Writ of Certiorari to the Court of Appeals, Second District, County of Los Angeles, State of California was denied on August 30, I983. (See App. C, infra, 53a).

4. Appellant's petition for a hearing with the Supreme Court of California denied August 30, I983. (See App. D, infra, 54a).

5. Appellant filed notice of appeal to the Supreme Court of the United States, in the Long Beach Municipal Court, accordang to Suppreme Court Rule I0.3, on October 28, I983. She filed for "Extension of Time To Docket Case On Appeal", which was extended by Mr. Justice Rehnquist, to January 28, I984.

If this Court finds Appellant's appeal was improvidently taken, would it please regard

this as a petition for a Writ of Certiorari, according to 28 U.S.C., section 2103. Appelland exhausted all judicial remedies available to her in the California courts, on up to a final decree by its highest court, which qualifies her to appeal or to petition for a Writ of Certiorari, to this Court according to 28 U.S.C., section 1257.

CONSTITUTIONAL PROVISION & STATUTES INVOLVED

1. Federal Constitution; Ammendment 14-Due Process clause.
2. California Civil Code 789.3(b) (See App. F, infra 56 a).
3. California Civil Code 1951.2 (See App. F, infra, 56a).
4. California Civil Code 1951.3 (See App. F, infra, 57a).
5. California Civil Code 1954 (See App. F, 58a).
6. California Code of Civil Procedure 1160 (2) (See App. F, infra 59 a).
7. California Code of Civil Procedure 1172, (see App. F, infra 59a).

STATEMENT OF THE CASE

WHETHER THERE WAS ABUSE OF DISCRETION BY THE APPELLATE DEPARTMENT, MISCONDUCT BY OPPOSING COUNSEL; THEREFORE A MISCARRIAGE OF JUSTICE.

This STATEMENT is in the form of a summary which will explain the above conduct in each sequence of the events of this case.

WAS THERE CONSTRUCTIVE EVICTION BY APPELLANT OR BREACH OF CONTRACT AND ABANDONMENT BY APPELLEE, ON APRIL 15, 1981?

I. On January 15, 1981, Appellant leased an apartment to Appellee and her son. When Appellant explained to Appellee that she was breaching lease conditions, Appellee informed Appellant she would vacate March 15, 1981. (Stated in Engrossed Settled Statement, page 10, line 14, hereinafter, E.S.S.10:14). Without notice, Appellee did not vacate then and did not pay her March 15, 1981 rent.(E.S.S: 10:17). March 19, 1981, Appellant received the first of two letters from Appellee's attorney. The letters mentioned harassment by Appellant and that Appellant constructively

evicted Appellee, and that Appellee would terminate the lease, vacate and surrender possession of the premises on or before April I5, I98I. (Defendant's Exhibits,hereinafter, D.'s: B & C). There was never any notice to the contrary from Appellee, prior (emphasis) to carrying out her surrender upon vacating April I5, I98I. (Complaint: 2:9).

2. Appellee's Complaint did not state a cause of action or damages for any constructive eviction on April I5, I98I. The trial judge calculated damages (rent) beginning May I6, I98I and not from the surrender on April I5, so it appears he considered Appellant took possession lawfully at that time. He also awarded Appellant rent for Appellee's extra occupant, so he must have considered this occupancy breached the lease.

Appellee's testimony made one general statement of harassment by Appellant--nothing specific.(E.S.S:8:IO). Appellee's witnesses never testified as to any harassment by Ap-

pellant to show cause for constructive eviction. If tenant claims constructive eviction but cannot substantiate it, then her unilateral surrender, before term of lease expires, is abandonment, by definition.

WAS THERE ABANDONMENT BY APPELLEE AND THEREFORE TERMINATION OF LEASE UNDER C.C. 1951.2?

3. Appellee's counsel stated that her first attorney notified Appellant that if she "continued her course of conduct, Appellee would have no choice but to "move-out". (Respondant's Opening Brief, hereinafter,R.O.B:2:I8). He also stated that evidence clearly established that "when Appellee went to live with friends, she did not have an intent one way or the other regarding abandoning the premises." (R.O.B: 6:7). His statements are not true., as the evidence proves. Appellee's first attorney's letters used the phrases, "terminate lease", "vacate and surrender possession of premises". (D.'s: B & C). He never stated she would "move-out" . Moving out can be only a temporary measure, while terminate

and surrender are evidence of intent to permanently relinquish possession. Appellee's counsel also said that "substantial evidence" exists and was presented to negate claims of abandonment,"(R.O.B:8:I7), but he does not state what that substantial evidence is. Then he states, "such evidence clearly and unequivocally evidences intent by Appellee not to vacate the premises." (R.O.B:8:28). Yet, in complete contradiction, he stated in his Complaint that Appellee "vacated the premises on April I5, I98I." (Complaint:2:9). This attorney intentionally and deliberately misled the Appellate Department on these and other important points so crutial to Appellant's case. Proof of Appellee's abandonment on April I5, I98I means the lease terminated, so later on May 4, I98I, when Appellee changed her mind about renting the apartment, it could only be a new tenancy. Many authorities show the moment the "intent" to surrender plus the"act" of carrying out the intent, unite, abandonment is complete and final.

Pickens v. Johnson, 107 C.A.2d 778 (1951).

4. California Civil Code 1951.2: when a tenant breaches the lease or abandons the premises, lease terminates. Letters to Appellant from Appellee's counsel stated termination of the lease, yet "Opinion and Judgment" (7:15) said:

> "..found no evidence herein of an avowed intention not to be bound by lease."

Appellate Department has consistently ignored those important letters, introduced into evidence.(D.'s: B & C), and the statutes and decisions of courts in superior jurisdiction, that apply to abandonment. This cannot be said to be mere error on their part, since these points were raised at the trial and in the appeal briefs, and also in the requests for rehearing and certification. Their "Opinion and Judgment" (7:7) also said:

> "..while there existed conflicting evidence produced during the trial concerning the issue of abandonment, we find substantial evidence to support the trial court's finding of no abandonment of premises by Appellee."

Appellate Department never stated what the substantial evidence was. They also refer to the trial court's finding of no abandonment, when the trial court did not make official findings. The only way one could speculate as to the trial court's opinion on abandonment was from the judgment order's calculations of damages. General damages (rent) were calculated beginning May I6, I98I, during Appellee's second tenancy (explanation forthwith), and not from the surrender on April I5, I98I, when Appellant took possession. It appears more likely the trial court found for abandonment by Appellee on April I5 and that Appellant took possession lawfully at that time. We find nothing to indicate Appellate Department's contention that the trial court found for no abandonment.

Appellate Department also stated"conflicting evidence was produced during the trial on the issue of abandonment."This is not the case. Appellant produced the letters from Appellee's counsel indicating surrender and

there was no evidence produced to show any change in Appellee's plans prior to completing her abandonment.

IS NOTICE OF "A BELIEF OF ABANDONMENT REQUIRED UNDER CALIFORNIA CIVIL CODE I95I.3?

5. Irregardless of whether there was an abandonment or a constructive eviction, the lease would terminate immediately, in either case. Appellee's notice stated she was terminating the lease, Later, Appellee's attorney said "absent a notice as provided under the civil code, the tenancy could not be terminated." (R.O.B:6:I8). This is inconsistent and untrue. C.C. I95I.3(f): states:

> "nothing in this section precludes lessor or lessee from otherwise proving that real property has been abandoned."

Beneath this code, in West's California Civil Codes, Legislature Committee Comment says: "This section provides a means for establishing abandonment." Therefore, the "notice" is not required. Appellant's counsel pointed out subd.(f) at the trial (E.S.S.I8:I8), so Appellee's counsel was aware of it. Yet, he

deliberately sought to mislead the Appellate Department regarding this code, so as to affect the outcome of their decision.

With Appellee's "notice" of surrender, a notice from Appellant asking Appellee if she intended to abandon said unit, would be redundant. A unilaterial surrender by a tenant is abandonment. Appellant's attorney did send Appellee a notice of "A Belief of Abandonment" later, on July I3, I98I, during Appellee's second tenancy.(Explanation is forthwith).

WHETHER SMALL CLAIMS ACTIONS FOR DELINQUENT RENT, FILED AGAINST APPELLEE WHILE STILL IN POSSESSION OF UNIT,AFFECTED THE SUBSEQUENT TERMINATION OF LEASE,UPON CARRYING OUT HER SURRENDER, BY VACATING UNIT?

6. Appellee's attorney's brief(R.O.B: 8:2) stated:

> "appellant sues appellee in small claims court for overdue rent, recovering.."

"Opinion and Judgment(2:20) stated:

> "appellant filed the first of three small claims actions against appellee for ren-

tal due 3/I5,4/I5, and 5/I5/8I. In each case, appellant recovered judgment."

The above statements are not true. There was only one hearing and one judgment. Appellant filed three small claims actions, but dropped the last two. (Plaintiff's exhibits,hereinafter, P.'s: 7,8, & 9). Appellee's counsel claims that because of the actions for rent, her tenancy was not terminated by Appellant (R.O.B:3:2), to which Appellate Department seems to agree.

April I5, I98I, when Appellant filed her second small claims action, both the March I5 and April I5 rents were delinquent, and Appellee testified she was still in possession on April I5, I98I (E.S.S:8:I7), which was the first day into a new rental month. Rent was due "in advance of the first of the first of the month. Appellee remained a month past her previous designated date of surrender and Appellant expected a reoccurance.

"A tenant who is only constructively evicted cannot repudiate his covenant

to pay rent while he remains in possession." Petroleum Collect. v. Swords, I22 Cal.Rep. II4 (7)(8)(I975).

In the instant case, there was no constructive eviction, but Appellee had so claimed. Even in constructive eviction, landlord is entitled to rent while tenant remains in possession. The third action was filed after the surrender and termination of lease, after Appellee's second tenancy began. So this third action could have no effect upon a lease which terminated a month earlier.

<u>WAS APPELLEE'S CLAIM, THAT SHE WAS EVICTED ON APRIL 26, I98I, VALID</u>?

7. Upon Appellee's surrender on April I5, I98I, Appellant took possession. While preparing unit for re-renting, she had an Estate Sale, therein, to sell some old furniture,etc. Appellee testified she returned at this time to move back in, and considered Appellant's sale constituted wrongful eviction of her. (E.S.S:8:26). Actually, she was the one entering illegally at this time. The lease had terminated and she had made no

agreement with Appellant to move back. On April 29, 1981, Appellant received a Settlement Offer from Appellee's counsel,(D.'s:K) which Appellant rejected. This offer is inconsistent with her claim of eviction on April 26 and also shows she knew she was not on solid ground, legally, regarding her abandonment,and illegal entry on April 26.

8. Appellate Department's "Opinion and Judgment" (5:14) stated:

> "Appellant prevented Appellee's access upon her return."

Appellee never made any such statement, and also it is not true.

IS ABANDONMENT FINAL OR CAN IT BE REVERSED?

9. There are many authorities on this point, which applies to occupants(tenants)as well as to owners of property.

> "Abandonment: ..property is to the former occupant or owner as though he had never occupied or owned it..it is absolute and immediate..no act will.. revive this possession..one may repossess property he has abandoned..it is new and distinct from the one abandoned."

Davis v. Butler, 6 Cal. 510 (I Cal. Jur. III, (1972) Pg. 17,sect. 7).

Therefore, abandonment cannot be reversed.

10. After her settlement offer was rejected, Appellee sent Appellant a May 4, 1981 letter (P.'s:10), saying she wanted to continue to rent the apartment. To avoid the work of re-renting, Appellant accepted Appellee as a tenant, again, which must be in a new tenancy.

" Abandonment once established is complete, whether it exists for a moment or continues for years." Trevaskis v. Peard, III Cal. 599 (1896),para. 6; I Cal.Jur.III(1972) Pg. 10,line 10).

Appellee's abandonment existed over two weeks--longer than a moment--so it was complete. Appellant sent a letter to Appellee on May 5, 1981, to discuss this tenancy, but as Appellee testified (E.S.S:II:7), she did not respond.

DO LANDLORDS HAVE THE RIGHT TO CHANGE LOCK COMBINATIONS TEMPORARILY IN AN EMERGENCY TO PROTECT UNIT, WHEN IT IS VACANT AND TENANT HAD NOT ENTERED INTO ACTUAL POSSESSION?

II. On Saturday, May I6, I98I, Appellant thought keys to said unit, tagged with address, were stolen or lost. As am emergency, safety measure to protect the property, Appellant had a locksmith change the lock combinations. The unit was still vacant. Appellee had not entered into possession. It was the weekend, and by Appellee's own testimony, she never gave her new home address to Appellant (E.S.S:II:23)., and the Operator had no listing for her. Appellant put a note on the front door and wrote a letter to send to Appellee's place of employment. The next day the keys were found. So Monday morning, May I8, I98I, Appellant had locksmith change locks back to their original combinations, instead of sending the letter, since Appellee had never responded to any of Appellant's communications. Verification of this can be made by the locksmith's written statement plus Appellant's two cancelled checks to him for doing both jobs. (D.'s: E,F,G). The locksmith was unable to attend the trial to

testify and Appellant's counsel said it was not necessary to postpone the trial, since the locksmith's statement and the checks would be adequate. But, they were not accepted into evidence at the trial. They were included in the record for the appeal.

WERE THE REQUIREMENTS OF CALIFORNIA CIVIL CODE 789.3(b) MET?

I2. Judgment was calculated under this section, which states:

> "In addition, landlord shall not, with intent to terminate the occupancy under a lease or other tenancy or estate at will, however created, of property used by tenant as his residence, willfully: prevent tenant from gaining reasonable access to property by changing locks.."

Code Requirement: Property must be used by tenant as his residence at the time an alleged violation of this code occurs. Appellee's counsel intentionally omitted this part of the code, when he stated what he called its "pertinent parts" in his brief(R.O.B: 9:9). Obviously, because Appellee was not residing there and had not resided there since she surrendered her occupancy April I5

In West's California Civil Codes, section 789.3, under "Notes of Decisions", Hale v. Morgan, I49 Cal.Rep. 375(I978), Supreme Court said:

> "If tenant abandons premises permanently for other lodging or for other reasons unrelated to utility termination is absent for substantial period so as to suggest he established another residency,during such period, landlord's conduct in terminating utility service cannot have deprived tenant of service."

Hale case involved utility termination but code applies similarly to changing locks. In the instant case, Appellee surrendered unit April I5, I98I,before the lock change on May I6, I98I, and took up residency elsewhere. The lock change did not deprive her of residency. Appellate Department failed to follow this Suprme Court decision. It also did not follow Civil Code 789.3, which is restricted to residential property, but is more restrictive yet, since the residential property must be used by tenant as his residence when violation occurs. The stiff daily penalty is to protect the "basic roof over one's head",

where such deprivation would pose a daily hardship. Appellant pointed out this requirement to the Appellate Department. (A.R.E:6:28). It was also pointed out in her requests for a rehearing (9:2I) and for certification to the Court of Appeals (2:I).

I3. Another C.C. 789.3 Requirement: is proof of a willful intent by landlord to terminate tenant's occupancy. Code does not state that changing of locks, in itself, is a violation. In Wolff v. Fox,I37 Cal.Rep. 258 (I977) Court said:

> "Absence of material finding of landlord's willfulness and intent to terminate, required reversal."

In the instant case, Appellee even testified she never informed Appellant she was unable to unlock said doors. (E.S.S:II:3). Therefore she never ascertained if there was this intent to terminate or if there was some reasonable explanation.

Both code requirements were not met, and each one is justification for reversal of

the judgment.

I3. "Opinion and Judgment" (9:24) said:

> "Ample evidence exists to show a finding of willfulness, permeating the actions and conduct of Appellant; her letter to Appellee demanding payment of rent due 5/6/81 and advising Appellee locks would be changed.." (Date of letter not stated).

"Opinion and Judgment" (3:5) also said:

> "On or about 4/30/81, Appellant wrote to Appellee requesting the return of apartment keys.."

It appears above that Appellate Department is describing two different letters:(I) a willful,demanding letter, and (2) a simple request for return of keys. Yet, both references are to the same, one letter, and how differently they are described. Obviously, Appellate Department never read that letter, yet this is the evidence they said showed Appellant intentionally terminated Appellee's tenancy, and their only reason for a violation of C.C. 789.3, and therefore an affirmance of the judgment against Appellant. Letter (2) is the way Appellant described her own letter. (E.S.S:5:9)(P.'s:II). Letter (I)

is the way Appellee's counsel described it. (R.O.B.:IO:IO). But he omitted this letter's April 30, I98I date, which is important since it shows it was written after Appellee's April I5, I98I surrender.

I4. Appellee's counsel distorted the wording and meaning of that letter, which emphasizes the keys and asks that they be surrendered since the unit was surrendered. Judgment rent was mentioned only incidentally saying it could be dropped in the mailslot with the keys, because that April 30 letter was partially a response to the April 29, Settlement Offer from Appellee's counsel, in which he mentions the judgment rent, first. That letter is not evidence of an intent to terminate Appellee's occupancy, since she had already surrendered it. Also it is common for landlord's to say if keys are not returned, tenant will be charged for changing the locks.

I5. Court said (70 A.L.R. I55,end of col.2):

> "..lessee has right of entry at time fixed by lease for him to take possession, but he must do something towards exercising this right. He must go to leased premises and see if they are ready for his possession..if..he is refused possession..he may sue lessor."

In the instant case, Appellee testified she never informed Appellant she could not unlock said unit doors. (E.S.S:II:3). So, she was not refused entry by Appellant.

> I6. "One cannot be evicted from premises of which he has never had possession--in other words, one cannot lose possession, if one has not had possession.." Simon v. Kirkpatrick, 54 A.L.R. I348.

Appellee surrendered her possession April I5, I98I and Appellant went into possession. Appellee changed her mind and wanted to rent the apartment on May 4, I98I, but she never again went into possession, during her second tenancy.

I6. Appellee's counsel stated, "Appellant had locks changed and they remained changed up to the date of the trial (August 24, I98I)" (R.O.B:I2:I3). This is untrue, and there is

no evidence of this. Appellee and her witnesses testified they tried to unlock said doors May 20 and 21, 1981 and Appellee testified she tried again May 29, 1981. There was no evidence or testimony beyond May 29. Also the witnessess only stated they could not unlock the doors with keys given them by Appellee. They never testified that they knew they had used the proper keys or that they knew for a fact Appellee had been locked out. (E.S.S:13: 8). Appellant testified locks were changed on May 16, 1981 and changed back to their original combinations May 18, 1981 and so Appellee should have been able to unlock said doors on May 20, 1981 and thereafter.

WAS THERE A FORCIBLE ENTRY AND DETAINER BY APPELLANT?

17. Appellee's counsel stated(R.O.B.5:8):

> "at the close of evidence,parties agreed that Appellee would waive her right to be awarded restitution of the premises for Appellant's right to hold Appellee to the terms of the lease for the balance of the term, whatever the outcome."

Appellant told her attorney it was not true. That at the close of evidence, trial judge asked Appellee if she wanted possession of said unit and she said"no". Then he asked if both parties wanted to terminate the lease, and both said"yes". But, Appellant's attorney disregarded her and stated in her reply brief that she stipulated to opposing counsel's statement.(A.R.B:I:22). Upset over this she wrote the trial judge. This angered her attorney, and he said he would get a hearing with the trial judge. Appellant represented herself at this hearing, having substituted out her attorney. The trial judge agreed with Appellant and not opposing counsel and his "Correction of Record"is on file. This is a verified example of misconduct by opposing counsel.

I8. Forcible Detainer: California C.C.P. II60(2) states that because Appellee claimed locks were changed while absent, a demand is required to be made for the surrender

of the premises. Appellee's attorney claimed her May 4, I98I letter to Appellant was an implied demand. (R.O.B:6:28). His statement completely contradicts his own client's testimony that she "did not send Appellant a letter demanding the premises back". (E.S.S: II:24). Also reading that letter would show that it clearly makes no such demand. There must also be a refusal to surrender, which there was not.

> "In forcible detainer: an attempt must made to regain possession and either force or threats used to resist it." Hodgkins v. Jordan, 29 Cal. 577 (I866)

Appellee testified she did not notify Appellant that she could not unlock said doors. (E.S.S:II:3). So,there was no confrontation with force or threats. Appellee's attorney said the above"case was decided under a statute different from C.C.P. II59 and II60 and had no bearing on this case." (R.O.B:7:I8). Yet, this is a prominent case in the current I98I edition of Deerings California Codes of Civil Procedure-II72,on

page 222, end of #7. This section does cover forcible entry and detainer, although opposing counsel would have the Appellate Department think otherwise. In fact, in contradiction, he had referred to this section often in his trial brief (4:7;5:I2 and 5:I9).

I8. Forcible Entry: a high degree of possession is required. One must be peaceably in"actual possession", having visible and notorious acts of dominion over it, which Appellee did not. She had only a constructive possession, after her second tenancy began, on May 4, I98I.

I9. California Civil Code I954:says that a landlord may enter his tenant's dwelling in an emergency. It may even be an occupied dwelling, whereas in the instant case, said unit was vacant and unoccupied. A landlord has the right to take steps to protect his property, especially one that has been vacant a long time.

QUESTIONS PRESENTED ARE SUBSTANTIAL

I. The Federal Question Of Violation Of Due Process:

a) Appellant raised the question of a violation of her due process, which would invoke the jurisdiction of this Court. The willful, irresponsible, and arbitrary conduct of opposing counsel had a prejudicial effect on the decision. He consistently made statements, which were distorted or untrue, regarding facts, laws, and decisions pertaining to this instant case. As an attorney, he is an officer of the court, an instrument to advance the ends of justice, yet he intentionally tried to mislead the courts, so as to unfairly influence their decision in his client's favor. Therefore, the Court's cannot rely on his presentations.

b) The Appellate Department showed a bias and prejudice to Appellant's case. It consistently went along with opposing counsel on all major points, in conflict. They failed to conduct an adequate investigation of

the case before them. This cannot be said to be just human error on their part, but an abuse of discretion--an abuse of their judicial power. Auditor Gen. v. Hall, 139 A.L.R. 1022. Appellate Department's analysis of the case had no factual or legal basis and its conclusion was manifestly unfair and resulted in a great injustice to Appellant.

c) If this Court finds that a petition for a Writ of Certiorari is more appropriate to this case, Appellant would like to emphasize the public importance involved. A high per centage of the public are either tenants or landlords and those that are not presently, will probably be one or the other in the future. So, it is important that there be a uniformity of decisions in cases that are similar. California C.C. 789.3 is a fairly new enactment, yet Appellate Department is in conflict with those few cases we were able to find. This will cause recurring problems for future litigants, because Appellate Depart-

ment failed to follow the doctrine of "stare decisis", and exceeded its jurisdiction. Appellant feels she was prejudically affected by the affirmance of the decision against her, which is in clear conflict with the fundimental principles of jurisprudence. Only this Court can correct such a miscarriage of justice.

2. Emphasis On Important Aspects Of This Case:

a) When Appellee vacated and surrendered said unit, the lease terminated under California C.C. 1951.2, enacted in 1971.(Under the old law, landlord had the option to terminate or not). Courts have recognized that people who abandon possession of property, sometimes change their minds. This is permitted, but the abandonment cannot be reversed. A new possession results. If this were not the case then tenants could turn around and sue their landlords for taking possession after their initial abandonment, and that is what Appellee

did. Her "Complaint" stated wrongful eviction on April 26, I98I, which was after her surrender and before her new tenancy began on May 4, I98I, after changing her mind about renting said unit.

After her abandonment, she expected a court action from Appellant for breach of contract, so she kept trying to reverse her abandonment. First, she returned April 26, I98I and found Appellant had physical possession. Then she made an April 29, I98I Settlement Offer,which was rejected. Then she sent her May 4, I98I letter about renting the unit.

If a tenant is delinquent in rent, but remains in residence, and later pays the deficiencies and landlord accepts the rent, the tenancy obviously continues. But, this is not what occurred in the instant case, and the Appellate Department refuses to recognize this fact. After May 4, I98I, they refer to her as an absent tenant, when she was not. She was a new tenant, but she never again resided in the

said unit or had "actual possession". California C.C. 789.3 requires the property be used by tenant as his residence at the time a violation is claimed.

CONCLUSION

Appellant has always been a model citizen and except for some small claims actions, this is her first major litigation. She has always had respect for the law and our judicial system. But, she has become disillusioned as a result of this court action, because she feels she is both legally and morally in the right and believes she should be exhonerated completely. She hopes that her faith, in our system, will be restored by this Court.

Appellant would like the Court to note probable jurisdiction of this appeal and set it down for plenary consideration, or prays that a Writ of Certiorari be issued from this Court.

Respectfully submitted,

Nancy Ann Konig

Nancy Ann Konig
Appellant, In Pro Se
202 West 37th Street
Long Beach, CA. 90807
213-#424-7753

January, 1984

APPENDIXES

APPENDIX A

JUDGMENT OF THE MUNICIPAL COURT OF LONG BEACH 35a

APPENDIX B

OPINION AND JUDGMENT ORDER FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT; AND OTHER ORDERS 36a

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NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES 55a

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CONSTITUTIONAL PROVISION AND STATUTES INVOLVED 56a

IN THE MUNICIPAL COURT OF
Long Beach JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA
415 W. Ocean Blvd., Long Beach

Case Number
243390

Sharon C. Abbott
Plaintiff(s)
vs.
Nancy A. Konig
Defendant(s)

APPENDIX A

Judgment computed as follows:

Rental Value from 5/16/81 to 8/25/81	$1,683.00
Punitive damages @ $25.00 a day	2,550.00
Return of deposit	750.00
Total	$4,983.00
Less: Extra person for 25 days @$10.00 pd	250.00
Unpaid rent from 6/15/81 to 8/25/81	990.00
	$1,240.00
Total amount awarded:	$3,743.00

Best Copy Available

APPENDIX B

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

OPINION AND JUDGMENT

INTRODUCTION

Defendant(Appellant), landlord of Plaintiff, appeals from a judgment in the sum of $3743. principle and $2000. attorney fees, granted plaintiff in an action filed by plaintiff in the Long Beach Municipal Court alleging five separate cause of action: Wrongful eviction (First Cause of Action);Trespass (Second Cause of Action); Forcible Entry (Third Cause of Action); Forcible Detainer (Fourth Cause of Action).

FACTUAL BACKGROUND

On or about January I5, I98I, defendant and plaintiff entered into a written lease agreement whereby plaintiff leased from defendant for the period of one year defendant's property located at 200 West 37th Street,

Long Beach, California. The lease provided for an initial payment of $I245.00, which included the monthly rent of $495.00 for the first month of the tenancy, January I5, I98I through February I4, I98I, and the security deposit in the amount of $750.00 which sums plaintiff paid upon execution. Prior to the passage of one month, plaintiff tenant and defendant landlord ceased harmonious relationship. Plaintiff took unto herself a male houseguest who required housing while engaged in matrimonial litigation. Defendant landlord claimed breach of lease, and demanded $I00. per month additional rent; plaintiff refused to pay same, and threatened to vacate premises prior to April I5, I98I. Upon plaintiff's failure to vacate or pay the rental due March I5, I98I, defendant filed the first of three small claims court actions against plaintiff for rental due for March I5, April I5, and May I5, I98I. In each case, defendant recovered judgment and plaintiff prompt-

ly paid the full amounts thereof. Plaintiff contacted an attorney during the 25-day stay of her houseguest, who admised defendant by letter that the plaintiff had the right under the lease to sublet the premise or parts thereof if she so desired, and that plaintiff would surrender the premises and lease on or before April I5, I98I, because of defendant's interference with plaintiff's rights under the lease. Prior to April I6, I98I, plaintiff physically vacated the premises. On April 26, I98I defendant held an estate sale out of the premises.

On or about April 30, I98I, defendant wrote to plaintiff requesting the return of the apartment keys. On or about May I6, I98I, according to defendant's testimony, she lost the keys to plaintiff's apartment, and therefore had the locks changed. Defendant further testified that she found her set of keys to the subject property on Sunday, May I6,

I98I, and had the locksmith change the locks back to their original combination on the following day, May I8, I98I.

Plaintiff testified that on or about May 20, I98I, she went to the premises to attempt to gain entry with her keys, and that her key would not work; that it was necessary to secure the services of a neighbor to extricate the key from the lock. She proffered that on May 2I, I98I and May 29, I98I, she again went to the apartment with her employer supervisor; again tried her key to the apartment and, again, met with failure.

On or about July I3, I98I, after this action had been instituted, defendant's attorney filed a notice of abandonment with plaintiff's attorney. Plaintiff's attorney answered such notice on July 27, I98I indicating plaintiff did not intend to abandon the premises.

CONTENTIONS OF APPELLANT

Defendant submits the following grounds as

basis for his appeal:

I. That the evidence adduced at trial was insufficient to support a finding of forcible entry or detainer;

2. That the evidence is insufficient to support a finding of wrongful eviction within the context and meaning of Civil Code section 789.3(b);

3. The Court committed reversible error by striking appellant's cross-complaint prior to the time of trial; and

4. That the award of damages and attorney fees were improper, unreasonable, and not supported by the evidence.

DISCUSSION

A. Sufficiency of the Evidence, Forcible Entry or Forcible Detainer

Defendant first contends that the evidence adduced at trial was insufficient to support a finding of forcible entry or forcible detainer. We find this position to be without merit. Our reasoning follow:

I. Code of Civil Procedure, section 1171 provides as follows:

"On the trial of any proceding for any forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that the was peaceably in the actual possession at the time of the forcible entry or was entitled to the possession at the time of the forcible detainer."

While the testimony of the parties conflicted, the trial record as depicted by the meticulously detailed and well-drawn Engrossed Statement indicates substantial evidence supportive of the finding and judgment of the trial court. As a reviewing tribunal, we must read the record in the light most favorable to the prevailing party, resolving any conflicts in the evidence in favor of the respondant and drawing whatever reasonable inferences are necessary to support the judgment. (Crawford v. Southern Pacific Co.

(I935) 3 Cal.2d 427,429.) "Substantial evi-. dence" does not mean 'a great deal of evidence'--the evidence supporting the judgment can be slight. "Substantial" means only that the evidence must be "credible and of solid value." (People v. Green (I980) 27 Cal.3d I, 55).

2. In our instant case, we find such credible and solid evidence. Defendant changed the lock to the rented premises without notifying plaintiff or giving her a new set of keys. Defendant unlocked the doors to the premises during the absence of the plaintiff tenant and conducted an estate sale from the premises, preventing plaintiff's access to the premises upon her return thereto. Unlocking doors without authority during the absence of the occupant constututes sufficient force under the statute. (Karp v. Margolis, (I969) 259 Cal.App.2d 69,73).

3. Defendant advances the argument that

plaintiff was not in actual possession of the premises at the time locks were changed and, therefore, there could have been no forcible entry or detainer within the context and meaning of the statute. We find that argument to be without merit. It has been long established that the term"actual possession" as codified in case law does not require actual, physicial presence or occupancy. (Shelby v. Houston (I869) 38 Cal. 4I0,423, reads:

> "All cases agree that, to sustain a charge of forcible entry, an actual peaceable and exclusive possession must be shown; but it has never been considered, so far as we are advised, that an actual residence-personal presence-was, in all cases, indispensible to such a possession. On the contrary, actual possession,said Mr. Justice Baldwin, in Minturn v. Burr, as much consists of a present power and right of dominion as an actual corporal presence in the house. (I6 Cal.I09). In that case, as in this, the premises were empty and unoccupied;but that fact was not considered inconsistent or repugnant to the charge of a forcible entry. Under rule the rule in that case, we hold that the plaintiff might have had a peaceable and undisturbed possession

of the premises in question within five days before the entry, notwithstanding the fact that he did not reside in the house during any portion of that time."

B. WRONGFUL EVICTION-CIVIL CODE SECTION 789.3(b)

Defendant asserts that the evidence received at trial is insufficient to support a finding of wrongful eviction pursuant to Civil Code section 789.3,subdivision (b). We disagree. Civil Code section 789.3,subdivision (b) provides as follows:

"(b) In addition, a landlord shall not, with intent to terminate the occupancy under any lease or other tenancy or estate at will however created, of property used by a tenant as his or her residence, willfully:

(I) Prevent the tenant from gaining reasonable access to the property by changing locks or using a bootlock or by any other similar method or device:

The evidence presented during the trial of matter before us clearly establishes that

defendant changed the locks to the subject premises without the knowledge or consent of the plaintiff, as stated hereinabove. While there was a conflict in the evidence presented as to whether the locks were changed back to their original condition one day after having been changed, the trial court found against defendant on this issue, and substantial evidence supports his decision. Thus we will not disturb his implied finding that such acts constituted a wrongful entry and detainer within the meaning of Code of Civil Procedure section 1159 and 1160. Similarly, while there existed conflicting evidence produced during the trial concerning the issue of abandonment, we find substantial evidence to support the trial court's finding of no abandonment of the premises by plaintiff. The evidence indicated that defendant on or about July 13, 1981 mailed to plaintiff a notice of belief of abandonment pursuant to Civil Code section 1951.3, and on

or about July 27, I98I. Plaintiff mailed to defendant her notice of intent not to abandon. We find no evidence herein of an avowed intention not to be bound by his lease with the policy limits set forth in Welcome v. Hess (I89I) 90 Cal/507.5I3 (cited favorably in Kassan v. Stout (I973) 9 Cal.3d 39, 42).

C. STRIKING OF CROSS-COMPLAINT

Defendant next contends that the trial court committed reversible error by striking defendant's cross-complaint prior to the time of trial. We find no error. Section II70 of the Code of Civil Procedure specifically provides: "On or before the day fixed for his appearance, defendant may appear and answer or demur". In Schubert v. Lowe(I924) I93 Cal.29I,at page 295, court quoting the above excerpt, says: "The section limits the defendant to an answer or demurrer. Obviously,therefore, a cross-complaint is inadmisaable in an action in unlawful detainer." See

also, Turem v. Texaco Inc.(1965) 236 Cal.App. 2d 758, in which the court states, "The law is clear that when possession is an issue, the municipal court has jurisdiction to strike a cross-complaint in an unlawful detainer proceeding." In the case at bench, possession was in issue throughout the trial.

D. AWARD OF DAMAGES AND ATTORNEY FEES

Defendant lastly submits the argument that no substantial evidence supports the award of damages and attorney fees. Again we disagree.

Civil Code section 789.3, subdivisions (c) and (d) provide as follows:

"Any landlord who violates this section shall be liable to the tenant in a civil action for all of the following:

(I) Actual damages of the tenant.

(2) An amount not to exceed one hundred dollars($I00) for each day or part thereof the landlord remains in violation of this section. In determining the amount of such

matters as justice may require..

(d) In any action under subdivision (c) court shall award reasonable attorney fee's to the prevailing party."

The judgment entered by the trial court in favor of the plaintiff on September 9, I98I, according to the clerk's minutes, indicate the judgment to have been computed as follows:

Rental Value from 5/I6/8I to 8/25/8I	$I,683.00
Punitive damages @ $25.00 a day	2,550.00
Return of deposit	750.00
	$4,983.00
Loss: Extra person for 25 days @$I0.00 pd.	250.00
Unpaid rent from 6/I5/8I to 8/25/8I.	990.00
	$I,240.00
Total amount awarded:	$3,743.00

We find the foregoing award to be constitutionally permissible under Hale v. Morgan (I978) 22 Cal.3d 388,399; that the parties hereto, after the close of presentation of evidence at the trial, stipulated that plaintiff would waive her right to be awarded restitution of the premises in return for

defendant waiving her right to hold plaintiff to the terms of the lease for the balance of the lease, regardless of the trial judge decision, and that the trial judge correctly designated the penalty imposition cut-off date to be the date of August 25, I98I, the date the matter was submitted to the court for decision. We find further that ample evidence exists to show a finding of willfulness permeating the actions and conduct of defendant: her letter to plaintiff demanding payment of rent due May 6, I98I and advising plaintiff that the locks would be changed; plaintiff's letter to defendant of May 4, I98I, in which plaintiff paid all rents due to May I4, I98I and advised defendant that the (plaintiff) would continue to rent the premises for the balance of the term; changing of locks by defendant on May I6, I98I after payment by plaintiff of rent for the period May I5, I98I to June I4, I98I, without notifying plaintiff; although defendant

was cognizant at all times of plaintiff's place of employment. We find the trial court's award of attorney fees to be reasonable under the facts of this case.

The judgment is affirmed. Respondant to recover costs on appeal.

We concur: Reese; Bernstein; Cooperman.

FILED
JUL 14 1983
John L. Clarke, County Clerk
By B. L. SCHNEIDER, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

SHARON C. ABBOTT,

Plaintiff and Respondent,

vs.

NANCY A. KONIG,

Defendant and Appellant.

) Superior Court No. CIV A 1524
)
) Municipal Court of the
) Long Beach Judicial District
)
) No. 243130
)
) ORDER DENYING REHEARING

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FILED
JUN 16 1983
A. J. CHARMAN, COUNTY CLERK
A B Hardey
BY A. B. HARDEY, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

SHARON C. ABBOTT,

Plaintiff and Respondent,

vs.

NANCY A. KONIG,

Defendant and Appellant.

) Superior Court No. CIV A 1524
) Municipal Court of the
) Long Beach Judicial District
) No. 243390
) ORDER DENYING CERTIFICATION

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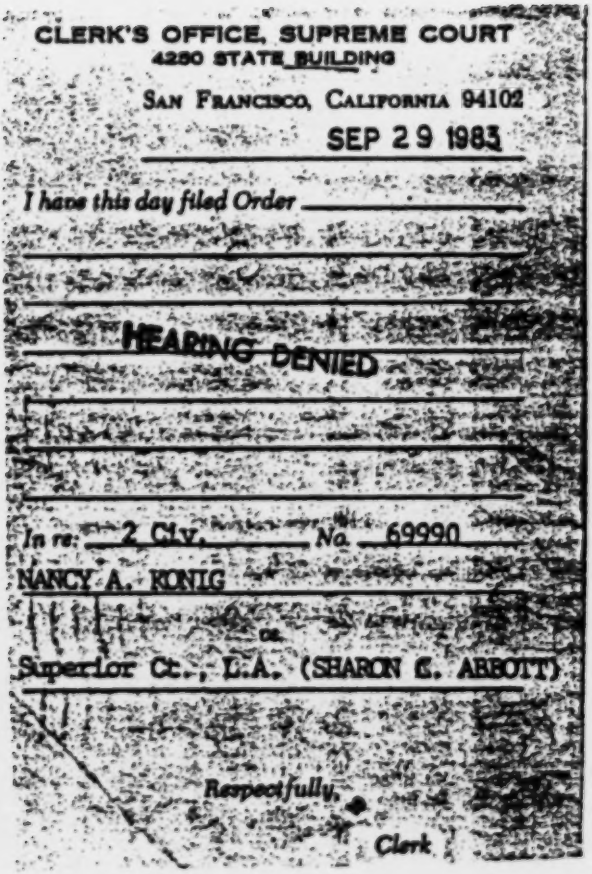
APPENDIX C

(DUE TO RESTRICTION IN SIZE, ONLY PERTIN-
PARTS COULD BE INCLUDED).

APPENDIX D



CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

SEP 29 1983

I have this day filed Order

HEARING DENIED

In re: 2 Civ. No. 69990
NANCY A. KONIG
on
Superior Ct., L.A. (SHARON G. ABBOTT)

Respectfully,

Clerk

APPENDIX E

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[redacted]
[redacted]
[redacted]
[redacted]
Attorney In Pro Per For Appellant.

FILED
SEP 21983

IN THE MUNICIPAL COURT OF LONG BEACH JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA.

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CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Constitution of the United States-Ammendment Fourteen: Rights Guarentted-Due Process Clause

"No state shall deprive any person of life, liberty, or property without "due process of law". Nor deny to any persons within its jurisdiction the equal protection of the law."

California Civil Code 789.3(b)

"In addition landlord shall not with the intent to terminate the occupancy under any lease or other tenancy or estate at will however created, of property used by tenant as his residency, willfully (I) prevent tenant from gaining reasonable access to property by changing the locks, using a bootlock or by any other similar method or device.

California Civil Code 1951.2(a)

"Except as otherwise provided in section 1951.4, if a lessee of real property breaches lease and abandons the property before the end of term, or if his right to posses-

sion is terminated by lessor because of a breach of the lease, lease is terminated. Upon such termination, lessor may recover from lessee: (The remainder of section consists of the award to which lessor is entitled).

California Civil Code 1951.3

(a) Real property shall be deemed abandoned by lessee, within the meaning of section 1951.2 and lease shall terminate, if lessor gives written notice of his belief of abandonment as provided in this section and lessee fails to give lessor written notice, prior to date of termination specified in lessor's notice, stating that he does not intend to abandon real property and stating an address at which lessee may be served by certified mail in any action for unlawful detainer of real property. (b)(c)(d) and (e) involve the notice itself and an example of the form of the notice.

(f) "Nothing in this section precludes lessor or lessee from otherwise proving real property has been abandoned by lessee within the meaning of section 1951.2."

(g) "Nothing in this section precludes lessor from serving a notice requiring lessee to pay rent or quit as provided in C.C.P. II6I and II62 at any time permitted by those sections, or affects the time and manner of giving other notice required or permitted by law. The giving of the notice provided by this section does not satisfy the requirements of sections II6I and II62.

California Civil Code I954 (a)

"A landlord may enter the dwelling unit only in the following cases: (a) In case of emergency. Except in cases of emergency or when tenant has abandoned or surrenderd premises, entry may not be made during other than normal business hours unless tenant consents at time of entry. The landlord shall not abuse the right of access or use it to harass the tenant. Except in case of emergency, when tenant has abandoned or surrendered premises or if it is impractical to do so, landlord shall give tenant reasonable notice of his in-

tent to enter and enter only during normal business hours. Twenty four hours shall be presumed to be reasonable notice in absence of evidence to the contrary."

California Code of Civil Procedure 1160(2)

"One is guilty of forcible detainer..who, in the night-time or during the absence of occupant..unlawfully enters real property, and who, after demand is made for surrender thereof, for period of five days, refuses to surrender the same to such former occupant."

California Code of Civil Procedure 1172

"On trial of any proceedings for any forcible entry or forcible detainer, plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of forcible entry or was entitled to possession at time of forcible detainer. The defendant may show in his defense that he or his ancesters, or those whose interest in such premises he

claims have been in the quiet possession thereof for the space of one whole year before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings."

PROOF OF SERVICE-AFFIDAVIT OF SERVICE

(Rule 28.5(c)

I, Nancy Ann Konig, appellant herein, depose and say that on the 27 day of January, I984, I served three copies of a "Jurisdictional Statement", on Sharon Abbott, appellee herein. Service was by mail and documents were deposited at the U.S. Post Office, with first-class postage prepaid and addressed to her counsel of record, Mr. Jay Picking, at 555 East Ocean Blvd, Suite 8I0, Long Beach, CA. 90802.

All parties required to be served have been served.

Nancy Ann Konig

Nancy Ann Konig
Appellant, In Pro Se
202 West 37th Street
Long Beach, CA. 90807
(2I3) # 424-7753

Subscribed and sworn to before me this 27th day of January, 19 84

NOTARY PUBLIC
and for the County of Los Angeles, State of California.

Subscribed and sworn to before me at 302 Pine Avenue, Long Beach, CA.

OFFICIAL SEAL
MARTHA N. JACKSON
Notary Public - California
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
MY COMMISSION EXPIRES NOVEMBER 28, 1984